

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, SEPTEMBER 9, 2003

COMMONWEALTH OF VIRGINIA, ex rel.

STATE CORPORATION COMMISSION,  
Applicant,

v.

CASE NO. INS-2003-00024

RECIPROCAL OF AMERICA and  
THE RECIPROCAL GROUP,  
Respondents.

CLARIFYING ORDER

On July 11, 2003, the Deputy Receiver of Reciprocal of America<sup>1</sup> filed an Application for Order Authorizing the Continuation of Workers' Compensation Disability Payments by Reciprocal of America and The Reciprocal Group for Workers' Compensation Claims Denied Coverage by State Guaranty Associations ("Application"). Therein, the Deputy Receiver of ROA seeks a Commission Order authorizing him to continue payment of medical and recurring partial or total disability payments for workers' compensation claims that were assumed by ROA through assumption reinsurance, or similar transactions, and denied or likely to be denied coverage by the applicable state guaranty associations.<sup>2</sup>

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<sup>1</sup> Reciprocal of America and The Reciprocal Group are collectively referred to herein as "ROA."

<sup>2</sup> Application at 1.

The Deputy Receiver of ROA specifically asserts that the guaranty associations of the applicable states have refused, or likely will refuse, to make certain workers' compensation insurance policy payments for workers' compensation claims that ROA assumed from Self-Insured Trusts ("SITs") in Alabama, Arkansas, Kentucky, and Missouri and Group Self-Insurance Associations ("GSIAs") in Mississippi, North Carolina, Tennessee and Virginia (collectively referred to as the "Assumed Businesses") as a result of assumption reinsurance or similar transactions ("Assumed Claims").<sup>3</sup> The Deputy Receiver of ROA notes that the Assumed Claims will likely not be paid, because the Assumed Businesses were not member insurers and/or the policies under which the claims arose were not ROA policies. These payments total approximately \$125,139 weekly.

The Deputy Receiver of ROA further asserts that the insureds of the Assumed Businesses are direct insureds of ROA and, due to the necessity for continued payment by the recipients thereof, requests authorization from the Commission to continue making such payments.<sup>4</sup> The Deputy Receiver of ROA classifies the Agreements as "assumption reinsurance."<sup>5</sup> The Deputy Receiver of ROA asserts that the livelihood of many

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<sup>3</sup> Such Assumed Claims and assets of the Assumed Businesses were purportedly assumed by ROA through merger agreements or different forms of assumption agreements ("Agreements"). Application at 4.

<sup>4</sup> Id.

<sup>5</sup> Id. at 6-7.

injured workers is dependent upon continued receipt of the payments and that a discontinuation of such payments would cause the recipients to suffer a substantial hardship.<sup>6</sup> The Deputy Receiver accordingly seeks an Order from the Commission authorizing the continued payment of workers' compensation insurance policy claims assumed by ROA through assumption reinsurance or similar transactions and denied or likely to be denied coverage by the applicable state guaranty associations.<sup>7</sup>

On July 25, 2003, the SDRs<sup>8</sup> of the Tennessee Companies filed Objections to ROA/TRG Deputy Receiver Continuing to Make Certain Workers' Compensation Payments that Could be Paid from Alternative "Safety Net" Sources ("Objections"). The SDRs of the Tennessee Companies contend that the case for payment of the Assumed Claims is weak here, and it is unfair to create a priority for these claimants, because such claimants may be able to turn to uninsured employers funds (e.g., the Virginia Uninsured Employers Fund), self-insured guaranty funds, bonds or other surety posted by uninsured employers, and recovery from the employer against which the workers' compensation payment was

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<sup>6</sup> Id. at 9. The Deputy Receiver of ROA states that payments to approximately 450 injured workers are at stake. Id. at 10.

<sup>7</sup> Id.

<sup>8</sup> The Special Deputy Receivers of Doctors Insurance Reciprocal ("DIR"), Risk Retention Group ("RRG"), American National Lawyers Insurance Reciprocal ("ANLIR"), RRG, and The Reciprocal Alliance ("TRA"), RRG are referred to herein as the "SDRs." DIR, ANLIR, and TRA are referred to herein collectively as the "Tennessee Companies."

awarded.<sup>9</sup> The SDRs of the Tennessee Companies state that they are not opposed generally to the payment of "hardship" workers' compensation claims that truly are "essential to the daily sustenance of the recipients." They challenge the payment of non-"hardship" medical payments to health care professionals and institutions, such as hospitals, on the grounds that these payments represent "an unfair priority payment to persons or entities who are, in general, indistinguishable from the [Tennessee Companies'] insureds and third-party claimants."<sup>10</sup>

The SDRs of the Tennessee Companies request that (i) ROA/TRG be required to make good faith efforts to obtain coverage by the applicable state guaranty association(s) for, and to resist the denial by such association(s) of, the workers' compensation claims in question, including legal action where necessary, and to report its efforts and the results of those efforts to the Commission and to any other party that has entered an appearance in this matter; (ii) the Commission hold a hearing at which ROA/TRG would bear the burden of proving that the SITs and GSIAs in question were in fact "direct insureds" of ROA/TRG; (iii) if the Commission determines that the SITs and GSIAs in question were in fact ROA/TRG "direct insureds," ROA/TRG be required to prove which of the claims in question represent "hardship" claims that are truly "disability" claims

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<sup>9</sup> Objections at 3.

<sup>10</sup> Id. at 8.

"essential to the daily sustenance of the recipients" and that ROA/TRG be permitted to continue to pay only such "hardship" claims; (iv) sufficient time be given before the requested hearing to conduct reasonable discovery on the "direct insured" and "hardship" issues; (v) to the extent recipients of the workers' compensation payments in question have access to "safety net" sources of payment, such as (1) the Virginia Uninsured Employers Fund or to a similar fund or mechanism in another state, (2) a bond or other surety posted by a self-insured employer, or (3) recovery from the employer against which the workers' compensation payments were awarded, a stay be issued prohibiting ROA/TRG from continuing to pay the workers' compensation claims in question until a final decision is made on the merits of the "direct insured" and "hardship" issues; (vi) the ROA/TRG Deputy Receiver be ordered to determine as soon as possible what such "safety net" payments exist in each affected state and to make arrangements for the workers' compensation claimants in question to seek immediate recovery in each state from that safety net, including the notification of those claimants of the availability of such payments; and (vii) the ROA/TRG Deputy Receiver be ordered to respond to the objections raised by the SDRs of the Tennessee Companies within 10 business days detailing ROA/TRG's efforts and progress (1) in securing guaranty fund payments for the former SIT and GSIA policyholders in question, (2) in obtaining alternate funding

from "safety net" sources in applicable guaranty fund states, and (3) in obtaining reimbursement agreements with the applicable guaranty funds.<sup>11</sup>

The SDRs of the Tennessee Companies request that the Commission stay the continuation of workers' compensation payments until the "direct insured" and "hardship" issues are resolved on their merits.<sup>12</sup> The SDRs of the Tennessee Companies also argue that the Deputy Receiver of ROA has failed to support the Application legally and factually.<sup>13</sup>

On August 8, 2003, the Deputy Receiver of ROA filed his Response to the Tennessee Receivers' Objections to ROA/TRG Deputy Receiver Continuing to Make Certain Worker's Compensation Payments that Could be Paid from Alternative "Safety Net" Sources ("Response to Objections"). Therein, the Deputy Receiver claims that he is pursuing systematically different resources (aside from receivership assets) for payment of the workers' compensation insurance policy benefits, including the so-called "Safety Net," but asserts that to prevent substantial hardship to the recipients, continuation of these payments by the Deputy Receiver of ROA is necessary. He claims again that the policyholders of the SITs and the GSIAs are "direct insureds" and a direct responsibility of ROA, and he submits

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<sup>11</sup> Id. at 11-12, 24-25.

<sup>12</sup> Id. at 15.

<sup>13</sup> Id. at 16-22.

that the method of case-by-case segregation suggested by the SDRs of the Tennessee Companies among the recipients of those deemed to constitute true "hardship" claims would be highly subjective and impermissibly discriminate among similarly situated creditors.<sup>14</sup> The Deputy Receiver of ROA further outlines his ongoing efforts to seek reimbursement from other sources for these claims and asserts that there are potential problems with some of the proposed "Safety Net" sources.<sup>15</sup> The Deputy Receiver of ROA continues to maintain that claimants of the SITs and the GSIAs are "direct insureds" of ROA, that such payments constitute "hardship" payments, and that the Deputy Receiver of ROA proposes continued payments as in "interim measure" until reimbursement or payment from other sources can be secured.<sup>16</sup> The Deputy Receiver of ROA concludes by seeking a Commission Order that authorizes him to continue workers' compensation insurance policy benefits for claims assumed by ROA through assumption reinsurance, or similar transactions, and denied or likely to be denied coverage by the applicable state guaranty associations.<sup>17</sup>

On August 14, 2003, the Commission entered an Order Scheduling Hearing on Application and on August 18, 2003, the

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<sup>14</sup> Response to Objections at 6.

<sup>15</sup> Id. at 6-13.

<sup>16</sup> Id. at 13-20.

<sup>17</sup> Id. at 20.

Commission entered an Order Clarifying Previous Order ("Orders"). In the Orders, the Commission scheduled a hearing for September 17, 2003, to determine whether the insureds of the Assumed Businesses are direct insureds of ROA and therefore a direct responsibility of ROA or, if not, whether such insureds' claims should be treated as "hardship" claims. The Commission further ordered that the Deputy Receiver of ROA is not directed or authorized to make any workers' compensation insurance policy payments to claimants of the SITs or GSIA's until further Order of the Commission.

On August 14, 2003, the Virginia Property and Casualty Insurance Guaranty Association ("VPCIGA") filed the Objection of Virginia Property and Casualty Insurance Guaranty Association to Payment by Reciprocal of America and The Reciprocal Group of Workers' Compensation Claims ("VPCIGA Objection"). Therein, the VPCIGA avers that § 38.2-1509 of the Code of Virginia<sup>18</sup> addresses how the assets of the ROA estate may be distributed and that the Commission has no authority to deviate therefrom.<sup>19</sup> The VPCIGA also asserts that if workers' compensation claims under ROA insurance policies are paid now, it is likely that the claimants will receive a greater percentage of their claims than will the guaranty associations and other claimants with similar

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<sup>18</sup> All statutory references are to the Code of Virginia.

<sup>19</sup> VPCIGA Objection at 3-4.



priorities.<sup>20</sup> Hence, the VPCIGA requests that the Commission not permit: (i) any payments to be made on any workers' compensation claim unless it is a claim under a policy issued by ROA; (ii) any payment of any claim under any policy of ROA other than payments under § 38.2-1509 A until it can be determined that such payments can be made without creating an improper preference; (iii) any payment on any workers' compensation claim until the Deputy Receiver of ROA provides the Commission and other parties additional information to support the Application; and (iv) any payment to any provider of medical services until it can be determined that such payments can be made without creating an improper preference.<sup>21</sup>

On August 18, 2003, the Indiana Insurance Guaranty Association, the Kansas Insurance Guaranty Association, the Mississippi Insurance Guaranty Association, the Tennessee Insurance Guaranty Association, and the Texas Property and Casualty Insurance Guaranty Association ("Guaranty Associations") filed a Notice of Participation of Certain Guaranty Funds ("Notice of Participation") and their Objection of Certain Guaranty Funds to ROA/TRG Deputy Receiver's Application to Continue to Make Certain Workers' Compensation Payments ("GA Objections"). Therein, the Guaranty Associations claim that giving special priority to workers' compensation

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<sup>20</sup> Id. at 5.

<sup>21</sup> Id. at 8-9.

claimants as requested in the Application would constitute an illegal preference in violation of § 38.2-1509 B. Moreover, the Guaranty Associations argue that no "hardship" exception to the order of priority of distribution exists in the Virginia insurer liquidation statute.<sup>22</sup> The Guaranty Associations also aver that the Deputy Receiver of ROA's argument that the Assumed Businesses are direct insureds of ROA is without merit.<sup>23</sup> The Guaranty Associations request that the Commission deny the Application.

On August 22, 2003, the Coastal Region Board of Directors and the Alabama Subscribers it represents ("Coastal") filed the Coastal Region Board of Directors' Motion for Clarification of Order Scheduling Hearing and Application ("Motion"), wherein Coastal requests that the Commission clarify its previous Orders as to whether the hearing to be held on September 17, 2003 will be a final determination as to whether the insureds of the Assumed Businesses are direct insureds of ROA. Coastal requests that, if the Commission so intends, it should instead limit the hearing to determining whether or not to approve the Application without any prejudice to the right of any insured to present argument and evidence with respect to its status as a policyholder entitled to the priority created by § 38.2-

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<sup>22</sup> Notice of Participation at 3-4.

<sup>23</sup> GA Objections at 8.

On August 27, 2003, the Kentucky Claimants<sup>25</sup> filed the Kentucky Claimants Joinder in Coastal Region Board of Directors' Motion for Clarification of Order Scheduling Hearing on Application ("Joinder Motion"). In their Joinder Motion, the Kentucky Claimants express the same concerns raised by Coastal as to the scope of the hearing to be held on September 17, 2003, on these issues and request that the Commission clarify what is to be determined at the aforesaid hearing and limit its scope appropriately in accordance with Coastal's Motion.

On August 28, 2003, the Deputy Receiver of ROA filed the Deputy Receiver's Response to Objection of Virginia Property and Casualty Insurance Guaranty Association to Payment by Reciprocal of America and The Reciprocal Group of Workers' Compensation Claims ("Response to VPCIGA"). Therein, the Deputy Receiver of ROA claims that the VPCIGA Objection was not timely filed. The Deputy Receiver of ROA renews his request that the Commission enter an Order authorizing him to continue making medical and recurring partial or total disability payments for certain

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<sup>24</sup> Motion at 3.

<sup>25</sup> Clark Regional Medical Center, T.J. Samson Community Hospital, Pineville Community Hospital, Highlands Regional Medical Center, Twin Lakes Regional Medical Center, Hardin Memorial Hospital, Gateway Regional Medical Center, Regional Medical Center/Trover Clinic Foundation, Murray-Calloway County Hospital, Owensboro Mercy Health System, Harrison Memorial Hospital, River Valley Behavioral Health Hospital, Muhlenberg Community Hospital, and Lincoln Trail Hospital will be referred to herein as the "Kentucky Claimants."

workers' compensation claims assumed by ROA.<sup>26</sup> The Deputy Receiver of ROA expresses his willingness to provide evidence at the September 17, 2003, hearing to support the propositions that ROA treated the Assumed Business insureds as direct insureds not only by characterizing the transaction as direct insurance in financial documents but also, where applicable, by paying the premium tax and the guaranty fund assessment for the Assumed Business.<sup>27</sup>

On September 2, 2003, the Deputy Receiver of ROA filed the Deputy Receiver's Response to Objection of Certain Guaranty Funds to ROA/TRG Deputy Receiver's Application to Continue to Make Certain Workers' Compensation Payments ("Response to Guaranty Associations"). Therein, the Deputy Receiver of ROA makes similar arguments to those made in his Response to VPCIGA. The Deputy Receiver of ROA argues that the GA Objections should be overruled and that payments to, or for the benefit of, certain injured workers and their families should not be further disrupted.<sup>28</sup>

On September 4, 2003, the SDRs of the Tennessee Companies filed the Special Deputy Receivers' Motion for Clarification of Order Scheduling Hearing on Application. ("Motion for Clarification"). Therein, the SDRs of the Tennessee Companies

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<sup>26</sup> Response to VPCIGA at 1.

<sup>27</sup> Id. at 8.

<sup>28</sup> Response to Guaranty Associations at 2.

request clarification on the issues to be addressed at the September 17, 2003, hearing pertaining to the workers' compensation insurance policy payments issues raised in the Application. The SDRs of the Tennessee Companies assert that there are three issues to be determined at the September 17, 2003, hearing for which the Deputy Receiver of ROA bears the burden of proof: (i) whether payment of the workers' compensation policy claims will create an illegal preference; (ii) whether the employers that were members of the SITs and GSIA's in question became "direct insureds" of ROA and, if so, on what date, and (iii) whether the claims of the workers' compensation claimants in question are in fact "hardship" claims.<sup>29</sup>

We agree that the Application raises a number of issues, both legal and factual. Moreover, we did not contemplate that the approximately 450 injured workers referenced in the Application would need to be present at the September 17, 2003, hearing to prove that they possess hardship claims. Instead, as we stated in our previous Orders, the purpose of the September 17, 2003, hearing is to answer certain legal questions raised in the Application. Specifically, the parties to this case should be prepared to address: (i) whether the payments requested to be made by the Deputy Receiver of ROA in his Application are permitted to be made in light of the provisions

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<sup>29</sup> Motion for Clarification at 8.

of § 38.2-1509; (ii) whether any or all of the SITs and GSIA's or employers thereof may legally be considered direct insureds of ROA; (iii) whether the requested payments may be made under the "hardship" provisions of the Final Order Appointing Receiver for Rehabilitation or Liquidation entered by the Circuit Court for the City of Richmond on January 29, 2003, or whether such "hardship" payments may be made pursuant to some other statutory provision; and/or (iv) what criteria should govern the determination of what constitutes a "hardship" claim. The Commission wishes to have these legal questions argued at the September 17, 2003, hearing prior to making a determination as to whether any payments should be made as requested in the Application. The factual questions of who is entitled to receive payment, how much the payment should be, whether an individual falls within any established "hardship" criteria, and whether the individual SITs and GSIA's or employers thereof factually may be considered direct insureds of ROA are to be answered in the first instance by the Deputy Receiver of ROA after the Commission enters an Order addressing the legal questions.

Accordingly, IT IS ORDERED THAT:

(1) The parties that plan to participate in the hearing scheduled for September 17, 2003, to address the issues raised in the Application should be prepared to address the following issues: (i) whether the payments requested to be made by the

Deputy Receiver of ROA in his Application are permitted to be made in light of the provisions of § 38.2-1509; (ii) whether any or all of the SITs and GSIAs or employers thereof may legally be considered direct insureds of ROA; (iii) whether the requested payments may be made under the "hardship" provisions of the Final Order Appointing Receiver for Rehabilitation or Liquidation entered by the Circuit Court for the City of Richmond on January 29, 2003, or whether such "hardship" payments may be made pursuant to some other statutory provision; and/or (iv) what criteria should govern the determination of what constitutes a "hardship" claim; and

(2) This matter is continued.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to all persons on the official Service List in this matter. The Service List is available from the Clerk of the State Corporation Commission, c/o Document Control Center, 1300 East Main Street, First Floor, Tyler Building, Richmond, Virginia 23219.